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Supreme Court, U.S.
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No. 00-5961

IN THE

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that when a criminal defendant is convicted following a reasonable-doubt instruction that is erroneous under *Cage v. Louisiana*, 498 U.S. 39 (1990), he has been deprived not only of a procedural guarantee "without which a criminal trial cannot reliably serve its function," 508 U.S. at 281, but also of one of the bedrock elements fundamental to the fairness of a criminal trial in our system of justice: "the right to have the jury, rather than the judge, make the requisite finding of 'guilty.'" *Id.* at 278. Before *Cage* and *Sullivan*, this Court had never ruled that a defective reasonable doubt instruction violates the Constitution at all, let alone that it is an error so fundamental that it "vitiates *all* the jury's findings." 508 U.S. at 281. *Cage*, as explained in *Sullivan*, thus truly "alter[ed] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague v. Lane*, 489 U.S. 288, 311 (1989). *Cage* error is also "central to an accurate determination of innocence or guilt," *id.* at 313, because, as *Sullivan* explained, where there is *Cage* error there has been no determination of innocence or guilt at all. 508 U.S. at 279-81. As every court of appeals to consider the question since *Sullivan* has agreed, *Cage* thus satisfies the stringent criteria for retroactive application under the so-called "second *Teague* exception." It necessarily either has been made or should now be made retroactive; and in either case, the decision below must be reversed.

Respondent and the amici curiae that have filed briefs supporting the state seek to avoid this result largely by erecting and attempting to demolish straw men. In particular, they argue strenuously that not every error that is "structural," and thus immune from harmless-error review, necessarily satisfies the second *Teague* exception. That may or may not be so, but it is not determinative here. The issue in this case is whether the *reasons* given by this Court in *Sullivan* for its

holding that a violation of this *particular* rule constitutes structural error also lead to the conclusion that *Cage* satisfies the second *Teague* exception. Neither respondent nor any supporting amicus is willing to come to grips with what this Court said in *Sullivan*, for the simple reason that the Court's reasoning in that case compels the conclusion that *Cage* satisfies the *Teague* criteria. Whether the same is true of all other structural errors is largely irrelevant.

ARGUMENT

Because so much of the argumentation of respondent and the amici is directed at arguments *not* relied upon by petitioner Tyler, we begin by making clear what arguments are not necessary to our position in this case. Our position does not depend on the argument that all new rules that *should* be retroactive under a correct application of *Teague* have necessarily been "made retroactive" by this Court.[1] We also do not argue that this Court's order granting certiorari, vacating and remanding in *Adams v. Evatt*, 511 U.S. 1001 (1994), was a substantive holding that itself "made" *Cage* retroactive. And it is not necessary to our position to assert that all structural errors necessarily satisfy the criteria for retroactivity under the second *Teague* exception. To the extent that respondent and the amici devote themselves to refuting these arguments, they are taking on issues not actually presented by this case.

Petitioner's position, rather, is that this Court may at least in some circumstances "make" a new rule retroactive without expressly so holding, when the import of its rulings plainly dictates retroactivity. Here, the ruling in *Sullivan* requires

[1] Such an argument is possible under the statute, and the reasons for it have recently been cogently advanced in *Flowers v. Walter*, No. 99-35552 (9th Cir. Feb. 9, 2001). This Court need not, however, adopt that holding to rule that in this case, where the holding of *Sullivan* so strongly compels a finding of retroactivity, *Cage* has been "made retroactive" within the meaning of the AEDPA.

that result—not because all structural errors must satisfy the second *Teague* exception, but because the specific reasoning used by the Court in *Sullivan* to reach the conclusion that *Cage* error is structural also demonstrates how *Cage* satisfies the *Teague* exception. The Court's grant-vacate-and-remand order in *Adams* does not, of course, "hold" that *Cage* is retroactive, but it does establish that five members of the Court concluded that there was a "reasonable probability" that *Sullivan*'s structural error holding would lead the Fourth Circuit to reconsider its view of retroactivity (*see Lawrence v. Chater*, 516 U.S. 163, 167 (1996)), demonstrating that the structural error issue and the retroactivity issue are not, as respondent and the amici suggest, entirely unrelated. As significant as the Court's action in *Adams* is the unanimous response to *Sullivan* by the courts of appeals, which have clearly recognized the relationship between *Sullivan*'s reasoning and the *Teague* criteria. Understood correctly, what *Sullivan* says about *Cage* requires one of two conclusions in this case: either this Court has already made *Cage* retroactive, or it now should. Either way, reversal and remand is necessary.[2]

[2] Amicus curiae the Criminal Justice Legal Foundation suggests that, instead of reaching either of the questions presented (which are whether this Court has made *Cage* retroactive under 28 U.S.C. § 2244(b)(2)(A) and, if not, whether it should do so), this Court should affirm on the alternative ground that the *Cage* claim was not "previously unavailable" within the meaning of § 2244(b)(2)(A). This issue was not raised in or decided by either court below, and has not been briefed by the parties (nor, indeed, any of the other amici). Contrary to the CJLF's suggestion, this argument is in no way "subsumed" within the questions presented. If, as the CJLF contends, "previously unavailable" should be interpreted to mean something more than that a rule is new, then whether a claim was "previously unavailable" clearly would depend on the application of legal principles and facts different from those on which the questions presented hinge (as the CJLF's own brief demonstrates). *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (holding that the question of enforceability under the FAA of arbitration clauses in

I. *CAGE* WAS "MADE RETROACTIVE" BY *SULLIVAN*

The question whether a new rule can be "made retroactive to cases on collateral review by the Supreme Court" without a direct holding on retroactivity by this Court is of significant importance to the administration of the AEDPA, but it is largely theoretical as far as this particular case is concerned. If, as we argue, the reasoning of *Sullivan* dictates the conclusion that *Cage* must be retroactive in habeas corpus proceedings, the outcome of this case will be the same regardless of how the Court resolves the statutory issue of whether 28 U.S.C. § 2244(b)(2)(A) requires a direct retroactivity holding by the Supreme Court. In other words,

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employment agreements was not subsumed in the issue of whether employment discrimination claims were arbitrable). Because the CJLF's suggested alternative ground for affirmance would avoid the questions presented on a basis not raised by respondent in its brief in opposition, it should not be belatedly raised in the merits briefs (let alone an amicus brief). S. Ct. R. 15.2. As this Court has explained, because the "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of the questions presented in the petition," asserted nonjurisdictional reasons for not reaching those questions "should be brought to [the Court's] attention *no later* than in respondent's brief in opposition to the petition for certiorari. . . ." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992); *Lockhart v. Fretwell*, 506 U.S. 364, 371 n.4 (1993). In any event, the CJLF's argument is without merit. First, it is in essence an argument that petitioner Tyler procedurally defaulted the claim in his first habeas petition, but the state has never raised a procedural default defense. *Cf. Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981). Second, at the time of petitioner's first habeas petition, the most recent decision of the Louisiana Supreme Court (the denial of rehearing in *State v. Taylor*, 410 So.2d 224 (La. 1982)), foreclosed the claim; there was no support for a constitutional claim based on the instruction in Fifth Circuit case law; and virtually none in any federal case law. The case is thus wholly unlike *Engle v. Isaac*, 456 U.S. 107 (1982), where a plethora of lower-court case law supported the claim at the time the petitioner defaulted. *See id.* at 131-33.

if we are right about the implications of *Sullivan*'s reasoning, then even if *Sullivan* has not already "made" *Cage* retroactive, this Court should now "make" it retroactive in this case. Section 2244(b)(2)(A) will then no longer bar relief to Tyler on remand, as *Cage* will have been "made retroactive . . . by the Supreme Court" under any construction of that language.[3]

With that said, however, it remains our position that the statutory language supports the construction adopted by the Third Circuit in *West v. Vaughn*, 204 F.3d 53 (3d Cir. 2000), which recognizes that this Court can, at least in some circumstances, "make" something happen—that is, cause it to occur or bring it about—without a direct holding to that effect. Conventional definitions of the word "make" certainly permit this result, and neither respondent nor any amicus cites any authority for a more restrictive definition of the word "make."[4] Nor do they cite any legislative history that

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[3] As amicus curiae the Criminal Justice Legal Foundation puts it in its brief, *Cage* "could be [made retroactive] in this case, if it really did meet the criteria for retroactivity. . . . Nothing in the language of the statute precludes this Court from making a rule retroactive in a successive petition case and reversing a court of appeals' decision, even if that decision was correct when rendered, *i.e.*, the rule had not then been made retroactive." CJLF Br. 18. This is one point on which we are in full agreement with the CJLF, and neither respondent nor any of the other amici argues to the contrary.

[4] The Justice Department's amicus brief does not contest that conventional definitions of the word "make," on their face, encompass forms of causation more attenuated than direct and explicit compulsion, but contends that the usage *examples* contained in various dictionaries are more limited. The United States cites no authority for the approach of relying on usage examples to limit otherwise clear dictionary definitions, but in any event, whatever examples may have been chosen by the dictionaries' editors, it is easy to come up with other examples that are consistent with the construction offered by the Third Circuit in *West*. One need go no further than the words of the song: "You made me love you . . . ." It is doubtful that anyone listening to those words ever imagined

addresses the meaning of this particular provision and requires a narrower construction.

Instead, respondent and the amici argue principally that the *West* construction renders the words "by the Supreme Court" superfluous. That argument, however, misses the real issue, which is not *whether* some action must be taken "by the Supreme Court," but *what* action must be taken. The *West* construction of the statute does not have the effect of deleting the words "by the Supreme Court." It is still necessary that the Supreme Court must have done something to make a new rule retroactive; the point is simply that that action may take the form of something other than an express holding of retroactivity. Thus, the words "by the Supreme Court" still retain significant meaning. For example, if a court of appeals were to issue its own new rule, and then hold that the new rule satisfied the second *Teague* exception, it could be said that the new rule had been "made retroactive," but certainly not that it had been "made retroactive by the Supreme Court," since the Supreme Court would had done *nothing* to bring about the retroactive application of that particular rule. Thus, the words "by the Supreme Court" are not rendered mere surplusage by our proposed construction.

Ironically, even while arguing strenuously that our construction of the statute reads the words "by the Supreme Court" out of the law, the United States Justice Department, in its amicus brief, itself proposes a construction of the AEDPA under which those words are meaningless. The Justice Department contends that the AEDPA's one-year statute of limitations, which runs from the date of a Supreme Court decision announcing a new rule if that new rule has been "made retroactively applicable to cases on collateral review," should be interpreted (for policy reasons) to require a direct retroactivity holding by this Court, even though this

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that they meant that the subject of the song had explicitly ordered the singer to love him.

provision *omits* the words "by the Supreme Court" following "made retroactively applicable to cases on collateral review."[5] U.S. Br. 15, n.7. Thus, the United States asserts that the statutory phrase "made retroactively applicable" should be interpreted to mean the same thing *regardless* of whether it is followed by the words "by the Supreme Court." In short, it is the United States that advances the construction that renders those words superfluous, not petitioner. Apparently, the view of the United States is that the different placement of the phrase "by the Supreme Court" in the two otherwise similar provisions is simply a slip of the draftsman's pen.[6] The federal government's position underscores that interpreting the

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[5] The AEDPA's statute of limitations provisions are found in 28 U.S.C. § 2244(d)(1) (applicable to collateral review proceedings involving state prisoners) and 28 U.S.C. § 2255 (applicable to federal prisoners). The relevant subparts of both provisions end with the same phrase ("made retroactively applicable to cases on collateral review") without adding "by the Supreme Court."

[6] Moreover, contrary to the Justice Department's assertion that our interpretation of the statute poses practical problems with respect to the statute of limitations provisions, it is actually the government's construction that would render the statute of limitations totally unworkable. The language of the statute states that when a new decision of this Court is "made retroactive," the one-year limitations period for filing petitions under §§ 2254 and 2255 runs *not* from the date the decision is "made retroactive," but from "the date on which the constitutional right asserted was *initially recognized* by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C) (emphasis added); *see also* 28 U.S.C. § 2255 (same language except for omission of the word "constitutional" before "right"). If, as the government argues, an express decision of this Court is necessary to "make" such a new decision retroactive, and if, as usually happens, it takes more than a year for the retroactivity issue to reach and be decided by this Court (*e.g., Bousley v. United States*, 523 U.S. 614 (1998) (deciding retroactivity issue three years after initial decision)), then the limitations period (measured from the decision initially recognizing the right) will have expired before anyone knows that it has begun to run. Thus, the limitations provision only makes sense if the lower courts have the ability to recognize that a decision has been "made retroactive" without an express holding by this Court.

statute is not quite as straightforward as respondent and the amici would like to suggest, and bears out this Court's statement in *Lindh v. Murphy* that the AEDPA is not a model of statutory draftsmanship. 521 U.S. 320, 336 (1997).[7]

Respondent and the amici also stumble over the argument that, under *Bousley v. United States*, 523 U.S. 614 (1998), this Court undoubtedly "makes" certain of its decisions retroactive merely by announcing them. Neither respondent nor the amici can deny this point. Rather, they seek to minimize its significance by arguing that such decisions are rare, and since most of them involve questions of federal statutory interpretation, § 2244(b)(2)(A) and the parallel provision in § 2255, which only permit successive petitions raising new rules of *constitutional* law, do not apply to them anyway.

This answer, however, is deeply flawed. *First*, it evades the principal point of the example, which is that there clearly are circumstances in which this Court can "make" a rule retroactive without a direct holding to that effect. This in itself defeats the "plain meaning" argument on which respondent and the amici rely. *Second*, the argument overlooks that *Bousley*'s "automatic" retroactivity point also applies to constitutional holdings that place a defendant's conduct outside the reach of a criminal statute, such as *United States v. Eichman*, 496 U.S. 310 (1990), and *United States v. Lopez*, 514 U.S. 549 (1995).[8] Under the construction of the statute

[7] Further adding to the confusion is the position of another amicus, the CJLF, which argues that the omission of "by the Supreme Court" in the statute of limitations provision means that Congress clearly did *not* intend the statute of limitations provision and the successor petition provision to receive the same interpretation. CJLF Br. 12.

[8] As *Lopez* demonstrates, one need not go back decades to find examples of such constitutional "new rules" issued by this Court, as the CJLF contends. CJLF Br. 15-16. Other recent examples of constitutional "new rules" affecting both state and federal prisoners that would appear to qualify for automatic retroactivity under *Bousley* but require a separate

proposed by respondent and the amici, this Court would have to go through the useless exercise of addressing the retroactivity of such decisions before they could be raised in successive petitions under the AEDPA. *Third*, even as to purely statutory questions of federal law, the construction of the AEDPA offered by the United States as amicus curiae would require a separate retroactivity holding by this Court under the "made retroactively applicable" prong of the AEDPA statute of limitations in § 2255, which the government contends should be construed identically to the successive petition provision.[9]

Finally, respondent and the amici offer a variety of policy reasons to support their proposed construction of the statute. None is persuasive. First, respondent and the amici stress that the purpose of the AEDPA is to prevent abusive successive petitions and the "affront" to finality and federalism that they present. But the statute also reflects an express recognition that when a new rule of constitutional law clearly warrants

retroactivity holding to support a successive petition under respondent's construction of the AEDPA include *City of Chicago v. Morales*, 527 U.S. 41 (1999), *Carmell v. Texas*, 529 U.S. 513 (2000), and *United States v. Hubbell*, 530 U.S. 27 (2000).

[9] In addition, the government's construction would pose an anomaly for federal prisoners seeking to file successive petitions to take advantage of the automatically retroactive application of substantive decisions of federal criminal law such as *Bailey v. United States*, 516 U.S. 137 (1995). The United States contends that because such decisions are not new decisions of "constitutional law," they are not governed by the successive petition provision in § 2255 (which contains language identical to § 2244(b)(2)(A)); thus, successive relief may be obtained on the basis of such decisions only through a habeas corpus petition under 28 U.S.C. § 2241, which is available in such circumstances because the § 2255 remedy is "ineffective." *See Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); U.S. Br. 20-21 & n.9. But petitions by federal prisoners under § 2241 remain subject to the successive petition provisions of § 2255 by virtue of 28 U.S.C. § 2244(a), which thus, once again, imposes on such prisoners the problem of establishing that a new decision has been made retroactively applicable "by the Supreme Court."

retroactive application, these considerations are outweighed. A successive petition relying on such a rule is not abusive, and it is no more an "affront" to considerations of finality for a successive petition to be entertained when the courts of appeals unanimously agree that the clear import of this Court's decisions is that a particular ruling must be retroactive than for the petition to be entertained when this Court has expressly stated that the ruling is retroactive.

Second, respondent and the amici contend that our proposed construction of § 2244(b)(2)(A) would complicate the "gatekeeping" function of the courts of appeals under § 2244(b)(3) by forcing them to consider complex issues of retroactivity in the limited time permitted them for deciding whether to permit filing of a successive application. This argument, however, overlooks that the courts of appeals do not make final determinations at the "gatekeeping" stage as to whether a successive petition is permitted under § 2244(b)(2); rather, they determine only whether the applicant has made a "prima facie showing" of entitlement to proceed, which is subject to plenary consideration by the district court once the application is filed, and again on appeal from the district court's final disposition of the application. There is no reason to think that the courts of appeals will be incapable of quickly and economically making speedy "gatekeeping" determinations of whether this Court's decisions clearly require retroactivity of particular new rulings, subject to later, full consideration on the merits.[10]

Third, respondent and the amici seek to minimize the practical difficulties posed by their own construction of the statute by arguing that in those few cases where a new rule should be retroactive, it is appropriate to impose on this Court

[10] Indeed, that is what happened in this case: the Fifth Circuit permitted the filing of the application at the gatekeeping stage, and then gave plenary consideration to the issue after the petition had been filed and disposed of by the district court.

the burden of deciding the retroactivity issue so that meritorious successive petitions will be able to proceed. The United States submits, for example, that even where there is no conflict among the circuits, the retroactivity issue in such cases will, in light of the significance the AEDPA places on a decision of that issue "by the Supreme Court," qualify for review by this Court under Rule 10(c) as an "important question of federal law that has not been, but should be, settled by this Court." U.S. Br. 21; *see also* CJLF Br. 16-18. It may well be that, if respondent's construction of the AEDPA prevails, this Court will alter its normal standards of review to take cases (like this one) where the unanimity of the lower courts on retroactivity would normally make review of the issue by this Court unnecessary. The question, however, is whether it should have to. It is no small matter to impose even a small number of needless decisions on this Court. A construction of the statute that does so poses at least as much of an "affront" to principles of judicial economy (which the AEDPA is also intended to serve) as our proposed construction poses to the principle of "finality." Given that the statute can easily be read to avoid this result, the possibility that respondent's construction of the statute would result in even a relatively small number of cases needlessly reaching this Court is a significant reason not to adopt that construction.[11]

[11] Amicus curiae CJLF bases its disagreement with this point in part on its "belief" that there are *no* cases that will ever qualify for retroactivity under *Teague*'s second exception. CJLF Br. 16. If that were the case, then the adverse consequences of respondent's interpretation of the AEDPA would indeed be less severe. But we cannot believe that this Court would bother itself with addressing cases where the "precise contours" of the second *Teague* exception are "difficult to discern" (*Saffle v. Parks*, 494 U.S. 484, 495 (1990)) if those "contours" in fact encompassed only a null set.

II. *SULLIVAN*'S REASONING REQUIRES THAT *CAGE* BE APPLIED RETROACTIVELY IN CASES ON COLLATERAL REVIEW

Neither respondent nor any amicus contests the obvious proposition that the *Cage* rule satisfies the first of the two criteria a rule must meet in order to qualify for the second *Teague* exception: that is, the rule is "central to an accurate determination of innocence or guilt" and establishes "procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. The centrality to the guilt-innocence decision of an instruction that tells the jury how to make that decision could hardly be disputed, even if *Sullivan* had not made abundantly clear that when *Cage* error has been committed, there cannot possibly be an "accurate conviction." *See Nutter v. White*, 39 F.3d 1154, 1157 (11th Cir. 1994).

Respondent and the amici concentrate their fire on the proposition that *Cage* satisfies the second prong of *Teague*'s second exception—*i.e.*, that it "implicate[s] the fundamental fairness of the trial" and "alters our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 312 (internal quotation marks omitted). According to respondent and the amici, *Sullivan* does not establish that *Cage* satisfies this standard, because the inquiry into "structural error" performed by *Sullivan* is entirely unrelated to the fundamental fairness/bedrock elements strand of *Teague*.[12]

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[12] Respondent even goes so far as to accuse the federal courts of appeals that have unanimously held that *Sullivan* implies that *Cage* must be retroactive of "ignoring" the bedrock fairness prong of the *Teague* test. Any reading of the opinions demonstrates that this is a significant distortion of their holdings. *See, e.g., Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir. 1994) ("Without a jury's constitutional finding of guilt, a conviction lacks both 'accuracy' and one of the '*bedrock procedural elements* essential to the fairness of the proceeding.'").

In this regard, respondent and the amici devote much space to arguing that not all new rules whose violation is structural error necessarily also satisfy *Teague*'s second exception. In so doing, they attack an argument on which our position does not depend. Even in assailing what is essentially a straw man, however, respondent and the amici are forced to mischaracterize the structural error test in ways that substantially undermine their position. First, respondent and the amici contend that whether a rule is structural error depends largely on how difficult it is to "determine the effect of the error on the jury's verdict" and has "little to do . . . with whether the new rule is a 'bedrock procedural element[].'" U.S. Br. 26. Second, they assert that the Court's test for structural error is designed to sweep in a considerably larger number of cases than the very few that qualify for *Teague*'s second exception.

Both propositions would require this Court simply to ignore how it has defined the "structural error" test. In *Arizona v. Fulminante*, the Court made clear that whether an error is structural is not simply a matter of how easy or difficult it is to assess its effect on the outcome; rather, an error is structural only if it deprives the defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." 499 U.S. 279, 310 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)); *see also Neder v. United States*, 527 U.S. 1, 8-9 (1999) (same). *Fulminante* and *Neder*—whose analysis respondent and the amici are unwilling to address—establish that, far from having "little to do" with whether a rule is a bedrock procedural element of fairness, structural error in fact has *everything* to do with fundamental fairness.

The notion that structural errors are a dime a dozen while retroactive rules are a critically endangered if not outright extinct species is also misguided. This Court emphasized in *Fulminante* as well as in *Neder* that the class of errors that are

immune from harmless error review is an extremely narrow one. *See* 499 U.S. at 306; 527 U.S. at 8. The reason is similar to the reason that few rules are retroactively applicable on collateral review: only rarely is a right so critical to the fairness of a proceeding that its denial justifies overturning the finality of a jury's verdict without regard to whether the error had a perceptible impact on the result. This Court has recognized barely a handful of rules—six to be exact—that fall in this category. *Id.*[13]

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[13] The amicus brief filed by various state attorneys general asserts, erroneously, that the lower courts, in contrast to this Court, have been profligate in their recognition of new structural errors, and have elevated 29 deprivations to that status. State AG Br. 11 & n.2. The states raise the specter that these same courts, if unleashed by a ruling adverse to the state in this case, could hold all these rules retroactively applicable in collateral proceedings. Of course, if the *lower* courts have erred in recognizing too many "structural errors," the proper remedy is to rein in those decisions, not to counterbalance by being excessively stringent in applying the *Teague* retroactivity test to an error that *this* Court has determined to be structural. In any event, an analysis of the 28 (not 29) cases cited by the states reveals that there is much less here than meets the eye. Of the 28 decisions cited, four mention structural error only in passing or in dissenting opinions; 13 apply prior holdings of this Court regarding structural error to situations that are similar if not identical to those addressed by this Court; seven apply the prior holdings of this Court to situations that are clearly analogous; and three rely upon structural error only as an alternative basis for their holding—that is, they find that the result is the same under a harmless error standard. In fact, in only one of the 28 cases cited, *Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995), did a court both find a structural error not previously described by this Court and apply its holding retroactively to a case on collateral review. In *Harmon*, the trial court had failed to give *any* jury instructions at all that defined the elements of two of the offenses with which the defendant was charged. The Ninth Circuit, in a per curiam opinion, found such a total omission to be both structural in light of the reasoning of *Sullivan* and retroactive under *Teague*'s second exception, because of the "wholesale failure to define an offense for the jury," which was "tantamount to telling the jury to 'go in there and do whatever you think is right.'" *Id.* at 967. The Ninth Circuit's sensible resolution of what is probably a sui generis case hardly indicates that the floodgates are about to open.

Moreover, to the extent that there is some difference of substance between the structural error standard and the second *Teague* retroactivity exception, the difference relates primarily to the "reliability" aspect of *Teague*, which not all structural errors are required to satisfy, not the "bedrock fairness" requirement. In other words, if there are structural errors that do not satisfy the criteria of the second *Teague* exception, that is because they do not call into question the reliability of the guilt-innocence determination, not because they do not involve rules essential to fundamental fairness. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury is structural error); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of right to self-representation is structural error). A structural error may or may not relate to reliability, but it necessarily calls into question the fundamental fairness of the proceeding. And it is the fundamental fairness prong of *Teague*, not the reliability prong, that respondent and the amici claim that *Cage* fails to satisfy.

Ultimately, the relevant question is not whether structural errors in general satisfy *Teague*'s second exception, but whether this particular one does. The answer is found in *Sullivan*'s analysis of the nature of the *Cage* rule, which respondent and the amici take pains to avoid addressing specifically. *Sullivan* could not have made clearer that it was premised upon the notion that an erroneous reasonable-doubt instruction deprived the defendant of a fundamental right—a determination of guilt based on "'beyond a reasonable doubt' jury findings." 508 U.S. at 285 (Rehnquist, C.J., concurring). The error, the Court stressed, deprived the defendant of a "basic protection"—the "right to trial by jury." *Id.* at 281-82.[14]

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[14] Amicus CJLF observes that the right to trial by jury in noncapital cases announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968), was itself held nonretroactive (both to cases on direct appeal and cases on collateral

Nonetheless, respondent and the amici insist that even if *Cage* "implicate[s] the fundamental fairness of the trial," *Teague*, 489 U.S. at 312, it was still not a "watershed" ruling because it did not "alter our understanding" of bedrock principles of fairness, *id.* at 312, but was only an application of the principle, previously announced in *In re Winship*, 397 U.S. 358 (1970), that the Constitution requires that the standard of proof in a criminal case be "beyond a reasonable doubt."

Winship itself was unquestionably a watershed decision that altered our understanding of the bedrock principles of fairness required by the Constitution in criminal matters. But that does not mean that *Cage* was not. Although *Winship* announced the substantive standard of proof necessary to sustain a criminal conviction, this Court had never held until *Cage* that a reasonable-doubt instruction such as the one at issue here violated the Constitution, nor had it held that any error in *describing* the reasonable-doubt standard was an error of constitutional dimension requiring reversal of a resulting conviction. That is why *Cage* was, as all agree, a "new rule": it did not follow ineluctably from *Winship*, but broke new ground.

Thus, before *Cage*, it was not understood that a misdescription of the reasonable-doubt standard constituted a deprivation of the fundamental right to a jury determination

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review) in *DeStefano v. Woods*, 392 U.S. 631 (1968). But *DeStefano* was decided under the ad hoc balancing approach to retroactivity that this Court rejected in *Teague* and *Griffith v. Kentucky*, 479 U.S. 314 (1987), and its result thus does not dictate the result here under a test that turns on wholly different factors. Moreover, the *DeStefano* Court relied heavily on the proposition that the difference between being tried before a jury and being tried before a judge did not generally affect the accuracy of the guilt-innocence determination. 392 U.S. at 633-34. The same cannot be said of the difference between being tried before a jury under the proper standard of proof and being tried before a jury under an improper standard.

of guilt. And it was certainly not understood before *Cage* that this was an error so fundamental that, as *Sullivan* went on to hold, it "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. Therefore, the *Cage* rule, as explained by *Sullivan*, necessarily "alter[ed] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction," as *Teague* requires. *Teague*, 489 U.S. at 312. This (combined with the undisputed accuracy and reliability element) is what defines a "watershed rule" under *Teague*.

Respondent and the amici also seem to argue that *Cage* was not a "watershed decision" because it was not as significant an event in jurisprudential history as what *Teague* described as the archetypal "watershed decision"—*Gideon v. Wainwright*, 372 U.S. 335 (1963). *Cage*, they insist, is no *Gideon v. Wainwright*. To be sure, *Cage* is not the stuff of best-sellers and movies. Not many cases are. But *Teague*'s use of the term "watershed" is not intended to make retroactivity dependent on mere subjective assessments of how celebrated a ruling has become. Rather, it defines "watershed" rulings as those that are essential to the accuracy of the guilt-innocence determination and that alter our understanding of the requirements of bedrock fairness in a criminal proceeding. As *Sullivan* demonstrates, *Cage* meets those criteria precisely, no matter how low its profile may be in the public imagination or the annals of legal history.

Nor can *Cage* be deprived of its watershed status simply because the line between a constitutional violation as exemplified by *Cage* and an acceptable instruction as set forth in *Victor v. Nebraska*, 511 U.S. 1 (1994), is a fine one. The narrow distinction between what is constitutional and unconstitutional does not show that *Cage* represented only "incremental change" and "fine-tuning" (CJLF Br. 26). If anything, the decision that represented "incremental change" and "fine-tuning" was *Victor*, not *Cage*. More broadly, the

distinction at the margins between a constitutional violation and a practice that barely passes muster is always difficult to draw. That does not mean, however, that the decision that first holds that a particular practice can constitute a deprivation of a fundamental constitutional right is not a "watershed" decision.

In the final analysis, all of the arguments against finding that *Cage* satisfies the second *Teague* exception reflect a deep skepticism about whether *any* new decision can qualify under *Teague*. The briefs of respondent and the amici are permeated with the view that only cases decided at least thirty years ago (such as *Gideon*) or principles that have never been "new" at all (such as the rule against use of forced confessions) could possibly be so fundamental that they could satisfy *Teague*. But that is not what *Teague* says, nor does it reflect the views of Justice Harlan in his opinion in *Mackey v. United States*, 401 U.S. 667, 675 (1971), which *Teague* largely adopted. Rather, those decisions set forth principles that govern whether a rule is to be retroactive, and reflect the view that a rule that qualifies under those principles *should* be retroactively applied. And *Sullivan*'s analysis of the *Cage* rule demonstrates that *Cage* does indeed satisfy the *Teague* criteria. Fidelity to the reasoning of *Sullivan* and *Teague* therefore requires that *Cage* apply retroactively, as every federal court to address the issue after *Sullivan* has held.

CONCLUSION

Because *Sullivan*'s reasoning compels retroactivity of *Cage* under the principles of *Teague*, this Court either should now hold that *Cage* has been made retroactive under 28 U.S.C. § 2244(b)(2)(A), or it should make *Cage* retroactive by so holding in this case. In either event, the judgment of the Fifth Circuit should be reversed, and the case remanded for further proceedings in the district court on petitioner Tyler's petition for a writ of habeas corpus.

Respectfully submitted,

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